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No. 85-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIRAM WALKER & SONS, INC., a corporation and DISTILLERY WORKERS OF AMERICA, LOCAL 55

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Hiram Walker & Sons, Inc.,[1] Respondent herein, submits this Brief In Opposition to the Petition for Writ of Certiori filed in this proceeding. Respondent does not challenge Petitioner's Jurisdictional Statement or its statement of the Constitutional provisions and statutes involved, and also does not challenge Petitioners' Statement Of The Case except as to argument and innuendo contained therein. Respondent does challenge Petitioners' statement of the questions presented for review, believing the sole question to be the following:

[1] Pursuant to Rule 28.1 of this Court, Respondent has appended to this Brief In Opposition a list naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent.

Whether the Seventh Circuit erred in holding that the district court did not abuse its discretion in determining that the consent decree was "a fair, reasonable, and adequate resolution of this litigation."

REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit provides no basis for the grant of certiorari, and the Petitioners do not set forth reasons for granting the writ which conform in any way to the guidelines set forth in Supreme Court Rule 17. The district court's approval of the final consent decree was set forth in a comprehensive, thirty-six page memorandum which addressed all the factors that a district court should consider in making a "fairness" determination with regard to a Title VII class action settlement. The Seventh Circuit then upheld the district court's fairness determination utilizing the accepted judicial standard for appellate review of such a determination. The Petitioners attack the consent decree as being unfair and inadequate, but they do not assert that the district court abused its discretion in approving the consent decree, nor do they assert that the Seventh Circuit utilized an improper standard for appellate review of the district court's exercise of discretion. Petitioners do not assert that there is a conflict among the circuits with respect to either the proper standard for appellate review or the criteria to be utilized by a district court in making a fairness determination, nor do they assert that either the court of appeals or the district court in this proceeding departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioners do not assert that the Seventh Circuit here decided an important question of federal law which has not been, but should be, settled by this Court, nor do they assert in any properly cognizable fashion that the Seventh Circuit decided a federal question in a way which is in conflict with applicable decisions of this Court. In

short, Petitioners challenge the consent decree, but in the process do not raise any issue worthy of Supreme Court review.

A. Petitioners' Arguments In Support Of Their Petition Miss The Issue.

Petitioners argue that the consent decree approved by the district court in settlement of this Title VII action "defeats the purpose of Title VII" (Petition, at 9) and also that it offers "insignificant settlement awards and pension relief" pursuant to "arbitrary and capricious criteria" (Petition, at 17). These arguments are phrased and posited as though they were an attack upon the relief ordered by a district court following a fully-litigated trial on the merits which resulted in a finding of discrimination by the Respondent in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* But such is not the posture of this case. The consent decree under attack is the product of a *settlement* between the EEOC, as the United States government's employment discrimination enforcement agency, and the Respondents Hiram Walker & Sons and the Distillery Workers of America, Local 55. It was not based on any adjudication of liability on the part of Hiram Walker & Sons, Inc.

The difference between the exercise of a court's remedial powers following a finding of discrimination and its discretion in determining whether a voluntary settlement is "fair, reasonable and adequate" is readily apparent but must constantly be kept in mind. The Seventh Circuit's observation in *Armstrong v. Board of School Directors,* 616 F.2d 305, 314-15 (7th Cir. 1980) is particularly appropriate here:

> In making its fairness determination, the district court must not forget that it is reviewing a settlement proposal rather than ordering a remedy in a litigated case. As the Second Circuit noted:
>
> > "The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case."
>
> *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir. 1974).

Both the district court and the court of appeals at all times remained cognizant of this distinction. In its decision upholding the district court's approval of the consent decree here, the Seventh Circuit said:

> The district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' legal rights. ... The essence of settlement is compromise. ... Each side gains the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory. ... *Thus, the parties to a settlement will not be heard to complain that the relief afforded is substantially less than what they would have received from a successful resolution after trial.*

(Pet. App., at A9; citations omitted; emphasis added.)

Yet, the distinction so carefully kept in mind by the courts below has been lost on the Petitioners, *and they continue to complain that they were denied relief to which they allegedly would have been entitled only upon a judicial finding of discrimination.* Thus, the Petitioners contend that "[t]he purpose of Title VII is to put the discriminated plaintiff in a place he would have been but for the discrimination," and that "[t]he plaintiff is entitled to all benefits he would have gotten had there not been a discriminatory act." (Petition, at 10). This argument was raised below and dismissed without difficulty by the Seventh Circuit:

> [A]ppellants seek a favorable ruling from this court by appealing to the acknowledged remedial goal of Title VII to make whole the victims of sex discrimination. ... The problem with appellants' argument is that the principle that they cite applies only after there has been a judicial determination or a concession of liability. There can be no court-imposed remedy without a finding of liability. In the present case, there has been no such finding. The parties reached a settlement without a concession of liability by defendants and with the substantial possibility that trial would entirely absolve defendants. As one court has stated

> in a similar situation, the duty of a district court to make whole a victim of discrimination "arises only after a judicial determination of discrimination. A court asked to approve a compensation procedure established pursuant to a consent decree in which discrimination is neither admitted nor proven is in a fundamentally different position." *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 n.13 (D.C. Cir. 1977).

(Pet. App., at A14.)

B. The District Court Applied The Proper Standards In Approving The Consent Decree.

Because the district court's task was not to frame a remedy based on a finding of discrimination, but rather to review a settlement to determine whether it is "lawful, fair, reasonable, and adequate" (Pet. App., at A8), its role necessarily is a limited one. "[T]he district court must clearly set forth in the record its reasons for approving the settlement in order to make meaningful appellate review possible," *Armstrong v. Board of School Directors,* 616 F.2d at 315, while at the same time avoiding a judgment on the merits. The reasons for this limited role are clear. As the Seventh Circuit said in *Armstrong:*

> Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.

Id.

As reflected by the opinion below, the district court in the instant case paid careful attention to its role and conscientiously applied the appropriate standards. In *Armstrong v. Board of School Directors,* 616 F.2d at 314, and again in *Gautreaux v. Pierce,* 690 F.2d 616, 631 (7th Cir. 1982), the Seventh Circuit had set down considerations, drawn from the *Manual for*

Complex Litigation § 1.46 at 56-57 (West 1977) and from 3B Moore's *Federal Practice* ¶ 23.80[4] at 23-521 (2d ed. 1978), for the making of a fairness determination. The key factors, as set forth in Petitioners' Appendix at A8, are:

> [A] comparison of the strengths of plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery already undertaken at the time of settlement.

Of these factors, the Seventh Circuit noted, in agreement with the courts of the Second, Fourth, Fifth, and Eighth Circuits, the first is the most important. Pet. App., at A8; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

Reviewing the district court's application of the appropriate factors, the court of appeals said:

> [T]he district court gave careful consideration to the claims raised below by appellants and denied them relief only after a comprehensive, thirty-six page opinion. The court specifically addressed all the factors delineated in *Gautreaux*. The court properly focused its analysis on a comparison of the settlement benefits — acknowledged to be not overly generous, especially with respect to those women employed the longest — with the likely outcome of litigation. The court noted the great uncertainty about the proper resolution of a number of legal issues involved, any one of which, if resolved in favor of Walker, would result in no recovery for any of the affected women, even those who received benefits under the decree. While the number of objectors clearly concerned the district court, nevertheless, the court concluded that, on balance, the substantial risks of litigation and the time and expense that a long trial would require justified the settlement.

(Pet. App., at A10-11). Because the district court applied and gave appropriate weight to all relevant factors, the Seventh Circuit upheld the district court's determination.

The Seventh Circuit went on to observe that "[e]xcept for the number of objectors, none of the factors that have caused appellate courts to view certain cases with scepticism is present in this case." Pet. App., at A11. The two major objections advanced by the Petitioners — the allegedly adverse impact on the more senior females who allegedly "suffered the most discrimination," and the size and criteria for recovery — do not fall within this list of factors. Instead, as the court of appeals found, the district court carefully scrutinized the Petitioners' claims and concluded, on balance, that the relief afforded by the settlement was fair, reasonable and adequate. "There is no showing," the Seventh Circuit said, "that the amounts received by the beneficiaries of the settlement were totally inadequate .... Similarly, none of the women excluded from relief by the decree has established that she should have been included." Pet. App., at A12-13.

In their arguments to this Court, Petitioners repeatedly proffer assertions on disputed issues as though they were adjudicated facts. The assertion that the more senior females also suffered "the most discrimination" (Petition, at 10) and therefore should have received relatively more under the decree is an allegation, not a fact; moreover, even if the factual bases of the allegation were established at trial, the amount and extent of recovery would still have been subject to the legal constraints imposed by the applicable statute of limitations. The contention that "the company itself deliberately and actively discouraged its female employees from accepting involuntary transfers" (Petition, at 18) is a hotly disputed contention, not a fact. To have refused to approve the settlement on the basis of such assertions would have required the district court to do what it is prohibited by applicable legal standards from doing, that is, to resolve disputed issues on the

merits. Rather than yielding to rhetoric and to the Petitioners' invitation to go beyond legally permissible bounds, the district court instead properly applied and weighed the appropriate factors in making its fairness determination.

C. The Court Of Appeals Applied The Proper Legal Standard In Upholding The Decree On Appeal.

The Seventh Circuit properly observed that "[t]he district court may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate." Pet. App., at A9. As to its own role, the appellate court stated that "[w]hile a district court should be chary of approving a consent decree, an appellate court's review of a decree is even more limited," citing *Armstrong v. Board of School Directors,* 616 8.2d at 315 and *Dawson v. Pastrick,* 600 F.2d 70, 75 (7th Cir. 1979). Pet. App., at A9-10. *Accord, Parker v. Anderson,* 667 F.2d at 1209. In accord with the appellate courts cited in its opinion (Pet. App., at A10), it then proceeded to apply an "abuse of discretion" standard of review. Finding no basis for concluding that the district court's careful analysis embodied an abuse of discretion, the court of appeals upheld the district court's approval of the settlement.

While the Petitioners stop short of alleging an actual abuse of discretion, they contend that the criteria for recovery in the consent decree are "arbitrary and capricious." Petition, at 17. But this contention ignores both the district court's careful weighing of the relevant factors and the objective bases for recovery set forth in the decree itself. Individuals selected for initial assignment relief were those females who were initially assigned to the Bottling Line Seniority Division and who demonstrated by their use of transfers to other seniority divisions during the period 1975-1981 that they might both have accepted an initial assignment to a seniority division other than the Bottling Line Division and successfully performed the work in another division. Those eligible for initial assignment relief were determined by a review of each female employee's work

history, and each individual employee was given a certain amount for each year of eligibility. This amount was determined by comparing the earnings of male and female employees with comparable seniority dates and by negotiations between the EEOC and Hiram Walker.

With regard to pension relief, Hiram Walker's position was that no individual was entitled to any relief, since full pension relief had been provided by the shutdown agreement between Hiram Walker and Local 55, negotiated at the time of the shutdown of Respondent's Peoria, Illinois, plant in 1981. That agreement provided that any employee, male or female, who had not earned a full year of pension credited service because of a layoff during any of the years from 1973 through 1981 would receive a full year of credited service for any such year. In Respondent's view, any relief prior to 1973 would have been time-barred by the two-year limitation on back pay liability set forth in Section 706(g) of Title VII, as amended, 42 U.S.C. § 2000e-5(g). By way of compromise, however, Hiram Walker and the EEOC agreed that those female employees hired prior to 1960 who tried to perform work in a seniority division other than the Bottling Line Division on at least one occasion would receive two (2) years of additional credited service for pension purposes, while female employees hired between 1960 and 1965 who tried to perform work in a seniority division other than the Bottling Line Division on at least one occasion would receive one (1) year of additional credited service. These additional pension credits were based, in each case, on estimates by the EEOC and Hiram Walker of the average differences in years of credited service between male and female employees of comparable plant seniority.

The application of these objective criteria produced an outcome in which, as the Seventh Circuit observed, "a substantial number of the affected women received significant relief. . . ." Pet. App., at A13. This fact, "when considered in light of the expense and great risks of further litigation," led the

court of appeals to conclude that the district court did not abuse its discretion." Pet. App., at A13.

This conclusion, the Seventh Circuit went on to observe, was not altered by the number of objectors. Noting that *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) was the only case of which the court was aware in which the number of objectors was the key factor in reversing approval of a decree, the court noted that less than fifteen percent of the affected women objected to the decree in the instant case, as opposed to seventy percent in *Pettway*. Citing *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1983) and *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), in which decrees were approved despite objections by forty percent and fifty-five percent, respectively, of affected claimants, the court was able to conclude without difficulty that the number of objectors in the instant case, in contrast to *Pettway*, was not sufficient to raise serious doubts as to the fairness of the decree. Because "no other factor is present in this case to suggest that the settlement is suspect, either in amount or in the procedural manner in which the parties reached, and the district court approved of, the settlement," (Pet. App., at A13), the Seventh Circuit found no reason to disturb its conclusion that the approval of the decree was within the sound discretion of the district court.

CONCLUSION

For the foregoing reasons, Respondent submits that no basis exists for granting the Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit. Not only do the Petitioners fail to cite any reason for granting the Writ of the character set forth in Supreme Court Rule 17, but the reasons that Petitioners do advance in contesting the careful application by the courts below of prevailing legal standards for

the review of a consent decree do not provide any basis for the exercise of this Court's power of supervision. Accordingly, the Respondent respectfully submits that the Petition be denied.

Respectfully submitted,

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APPENDIX

The following is a listing of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of respondent. This representation is made pursuant to Rule 28.1 of this Court.

Hiram Walker & Sons, Inc. has as its parent corporation Walker-Home Petroleum, Inc. Walker-Home Petroleum, Inc. is owned by Maidstone Essex Limited, which in turn is wholly owned by Hiram Walker-Gooderham & Worts Limited. Hiram Walker-Gooderham & Worts Limited is owned by Home Oil Company Limited and Walker-Home Oil, Ltd. Hiram Walker Resources Ltd. owns Home Oil Company Limited and Walker-Home Oil, Ltd. Gulf Canada Corporation, Olympia-York Enterprises Limited and Interprovincial Pipe Line Limited have substantial interests in Hiram Walker Resources Ltd. In addition, there is pending litigation in which Allied-Lyons P.L.C. is challenging the interests of Gulf Canada Corporation and Olympia-York Enterprises Limited and is seeking control of Hiram Walker-Gooderham & Worts Limited.